U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 August 2005

BALCA Case No.: 2004-INA-294
ETA Case No.: P2002-CA-09532752

In the Matter of

CONCESSIONS MANAGEMENT SERVICES, INC.,
Employer

on behalf of

VILMA CUMAD ONG,
Alien.

Appearance: Eric C. Jacobson, Esquire
Culver City, California
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Vilma Cumad Ong ("Alien") filed by Concessions Management Services, Inc. ("Employer") pursuant to

section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On March 19, 2001, the Employer, a Food Service Management Company, filed an application for labor certification to enable the Alien to fill the position of "Manager," which was classified by the Job Service as "First Line Supervisors/Managers of Food Preparation." (AF 60).

In a Notice of Findings ("NOF") issued on October 1, 2003, the CO proposed to deny certification on the grounds that the Employer had unlawfully rejected two U.S. applicants (*i.e.,* French Dysart, Curtis J. Jeffreys). (AF 55-58). The Employer submitted its rebuttal on or about October 22, 2003. (AF 40-54). The CO found the rebuttal unpersuasive regarding the Employer's rejection of U.S. applicant Dysart only, and issued a Final Determination, dated November 28, 2003, denying certification. (AF 38-39). On or about December 30, 2003, the Employer filed a Request for Review of the

Denial of Certification, together with various additional documents. (AF 1-37). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Following the issuance of a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief," dated June 30, 2003, the Employer filed a Statement of Position in support of its appeal.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988); *Tilden Car Care Center*, 1995-INA-88 (Jan. 27, 1997). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the NOF, the CO stated, in pertinent part:

> One of the applicants was French Dysart. He or she appears qualified based on review of the resume because of management experience at a Denny's Restaurant, other management experience in food service, and a vocational degree in culinary arts and management.

> The employer's letter to him/her has a postmark from Beverly Hills with the date in the center blacked out, and a second postmark that shows the date only, August 22. There is no return receipt. The letter invited the applicant to an appointment of August 28, 2002. The recruitment report indicates that [sic] failed to show for the interview.
>
> We do not find that French Dysart was rejected for job related reasons because the employer has not documented sufficient attempt to contact and recruit him/her….
>
> Corrective action:
>
> Submit rebuttal which documents the U.S. workers named above were recruited in good faith during the recruitment period and have been rejected solely for lawful, job-related reasons.

(AF 44-45).

In its rebuttal, the Employer sought to address the above-stated deficiency. (AF 40-54). The Employer provided documentation which established that a letter was sent by certified mail on August 22, 2002. The Employer also explained that the unclaimed letter was not returned by the post office until after the FINAL DOCUMENTATION NOTICE had been filed. Accordingly, the Employer's rebuttal included a copy of the letter envelope, which showed that Mr. Dysart did not claim the letter despite being notified on three occasions. (AF 41,49-51). Furthermore, the Employer stated, in pertinent part:

> Aside from the letter, which we CERTIFIED mailed to DYSART on 08/22/2002, a follow up call was also made on 08/26/2002 at 10:31 am. A message was left advising and reminding DYSART of the interview appointment on 08/28/2002. The Telephone # (■■■)■■■-■■■■ was provided on DYSARTS (sic) Resume. We are attaching herewith a photocopy of the SBC Tel. BILL for Concessions Management Services, statement date September 13, 2002 indicating that a call was made advising and reminding DYSART of the appointment. The recruitment was done in good faith.
>
> It was beyond our control if the applicant DYSART have decided not to appear for the interview or at least respond to our call made on 08/26/2002 to advise us of non interest in the job or ever requesting for a later

> interview date. We have complied with EDD Recruitment instructions and recruitment efforts have been met.

(AF 41; *see also* AF 52-53, 77) (telephone number redacted).

In the Final Determination, the CO denied certification, stating, in pertinent part:

> Based on the information in the rebuttal, the issue for review and consideration is whether the telephone call to French Dysart on August 26, 2001, was sufficient when the employer did not have knowledge of whether or not the letter that advised of the appointment had been received. The employer has not stated how the message was left, i.e., with someone or on a machine. Whereas the applicant did not have the employer's letter, for a message to have been successful it should have made clear what advertised position the interview was in reference to, that the location and time of the interview were clearly explained, and how the employer could be contacted if the person needed to reschedule. The employer has not in this case provided such specific information about the content of the message that was left. The telephone bill shows that the call was for only one minute.
>
> After reviewing all information as discussed above, we do not [sic] that the documentation submitted shows that the employer made sufficient good faith effort to contact and recruit applicant Dysart. Providing such documentation, in whatever form it might have been, was the responsibility of the employer who was seeking labor certification.
>
> Determination:
>
> Therefore, the application is denied.

(AF 39).

Upon review, we find that the Employer's failure to provide the specific, detailed information set forth in the Final Determination is inextricably linked to the CO's failure to provide more explicit instructions in the NOF. Accordingly, in the absence of such instructions, we find that the Employer could have reasonably expected that its submissions on rebuttal would successfully address the deficiency.

Notwithstanding the foregoing, we find that the concerns described by the CO in the Final Determination have merit. The rebuttal evidence clearly establishes that the certified letter sent by the Employer to U.S. applicant was never claimed. Accordingly, the CO's concerns regarding the details of the August 26, 2002 telephone call are valid. However, instead of summarily denying certification, the CO should have issued a supplemental NOF, in order to give the Employer an opportunity to address these concerns. *See, e.g., Marathon Hosiery Co., Inc.*, 1988-INA-420 (May 4, 1989)(*en banc*); *Shaw's Crab House*, 1987-INA-714 (Sept. 30, 1988)(*en banc*).

Finally, we note that Employer submitted extensive new evidence with its Request for Review. (AF 1-37). In its Statement of Position, it expressly relied on these new submissions. However, the provisions of section 656.24(b)(4), which requires the development of evidence before Certifying Officers, "is an expression of the importance for labor certification matters to be timely developed before certifying officers who have the resources to best determine the facts surrounding the application." *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). Accordingly, the regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. §656.24(b)(4); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989)(*en banc*). In the present case, the post-Final Determination submissions were not considered by the CO. Therefore, such evidence is not properly before us for review.

In summary, we find the inadequacy of the NOF undermined the Employer's ability to rebut the deficiency cited therein. Accordingly, we deem it appropriate to remand this matter. On remand, the CO is directed to consider the new evidence submitted by the Employer. If the CO determines that such evidence establishes that the Employer made a good faith effort to recruit U.S. applicant Dysart, he shall grant certification.

ORDER

For the reasons stated, the denial of certification is **VACATED**, and this case is **REMANDED** to the Certifying Officer for further proceedings consistent with this Decision.

For the Panel:

A

John M. Vittone
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.